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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 604

SKIBS, A/S MARIE BAKKE,

Petitioner,

v.

OTIS, McALLISTER & CO., a corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER IN REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

IRA S. LILLICK
HARRY L. HAEHL, JR.
GEORGE W. HELLYER, JR.
GARY J. TORRE
311 California Street
San Francisco 4, California

TOM KILLEFER
1625 K Street, N. W.
Washington 6, D. C.
Counsel for Petitioner

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Respondent Misstates the Question Presented

The Brief for Respondent states that the "Question Presented" is whether a carrier subject to COGSA "may utilize an invoice value clause to reduce its liability . . . ." So stated, the question *assumes* that the clause does reduce liability. Yet the opinion of this Court in *The FERNCLIFF*, 306 U.S. 444 (1939), shows that it does not.

The FERNCLIFF said such a clause merely adopts "an agreed value as a measure of recovery for loss or damage . . ." and "prescribes a measure of recovery rather than limits the amount which may be recovered . . ." (306 U.S. at 448). More specifically, it " 'does not appear to operate in that way [i.e. "to relieve the carrier from the consequences of its negligence"]' " (306 U.S. at 449). The case holds that such a clause neither limits nor relieves liability.

Having assumed that the clause does what *The FERNCLIFF* says it does not, respondent then phrases the "Question Presented" in a way which answers itself.

This is not the question. The issue is whether respondent can escape the rule of *The FERNCLIFF* by avoiding or distinguishing it. Respondent cannot avoid it by predicating the "Question Presented" on an assumption which the rule of that case contradicts. The attempted distinction offered by respondent and by the Court of Appeals below cannot be justified. There are no differences in the pertinent parts of the Harter Act and COGSA sufficient to explain the diametrically opposed results (Petition, pp. 13-15). The legislative history of COGSA shows no congressional intent to change the well established prior rule, as is required by the standards set by this Court in *The ESSO BELGIUM*, 343 U.S. 236 (1951), and the complete silence of the Court of Appeals below on this issue cannot by any stretch of the imagination be interpreted, despite respondent's rather surprising argument (Brief, pp. 5, 6), as a finding to the contrary. Reliance on a dictum quoted in *The FERNCLIFF* (Brief, p. 4) proves to be entirely unwarranted when the "question" which was "not likely to again arise" is identified with the specific issue then before the Court. (This is treated in greater detail in the Petition p. 15, Footnote 15).

The operation and legal effect of a true valuation clause

established by the rule of *The FERNCLIFF* make such a clause as valid under COGSA as it was under the Harter Act. Application of the standard of statutory construction expressed in *The ESSO BELGIUM* shows that COGSA did not change the well settled prior law. These two cases should only be challenged directly. A foreign court or a lower Federal court should not evade the one by specious "distinction" and completely ignore the other. Such a direct challenge, which we welcome, can properly be made only in this Court.

Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

IRA S. LILLICK
HARRY L. HAEHL, JR.
GEORGE W. HELLYER, JR.
GARY J. TORRE
311 California Street
San Francisco 4, California

TOM KILLEFER
1625 K Street, N. W.
Washington 6, D. C.
Counsel for Petitioner

February 9, 1959

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